made for registration thereunder by May 1971. According to the Registrar of the Professional Engineers Board officers of the relevant Departments consulted by the project and its corps of professional advisers and employees would not concern themselves with questions like whether any of them were professionally registered or otherwise. This would be the concern of the professions themselves and the Boards responsible for regulating the registration and conduct of members of such professions.

The question is whether, when A employs B to perform services of a professional nature which, by law, B can only perform if registered as a member of that profession, A can employ B who is not so registered at the date of the contract of employment without being a party to a contract which is illegal in itself. In my judgment, harsh though the result may appear to be, such a contract would be illegal and no question of *mens rea* or wicked intention arises for consideration so long as it is for the public benefit and safety that a penalty is imposed on those who contravene a provision against such employment. Section 19 of the Act is such a provision.

Section 18 similarly prohibits any unregistered person from practising as a registered professional engineer and, in particular, from engaging in professional engineering work unless he does so under the direction or supervision of a registered professional engineer. Notwithstanding submissions to the contrary, it seems to me that an overseas professional engineer who undertakes employment as such in Singapore even in respect of one isolated project such as this one would be contravening the provisions of section 18 should he fail to register himself unless he engages in such employment under the direction or supervision of a registered professional engineer or succeeds beforehand in being exempted by the Minister from the provisions of this section and from any rules made thereunder by virtue of section 23 of the Act.

I am aware that to hold that the contract is illegal *ab initio* may appear to be harsh but such is the position with regard to illegal contracts where both parties have contravened the law and the plaintiffs, much as I may sympathise with them, are left without remedy. Ignorance of the law or even innocent participation in such a contract cannot avail the plaintiffs in the absence of any transitional savings provision in the Act empowering persons like the plaintiffs to continue providing engineering services in Singapore without registration after January 2, 1971 as they were apparently able to do prior to the coming into force of the Act on that date. It should be remembered that even an overseas lawyer who intends to appear in one case only in Singapore has to be admitted to practise as an advocate and solicitor under section 18 of the Legal Profession Act (Cap. 217).

The defendants accordingly succeed, notwithstanding their own participation in this illegal contract, in their contention that the plaintiffs' claim is unenforceable. The claim is accordingly, with regret, dismissed with costs.

Claim dismissed.

Solicitors: *Donaldson & Burkinshaw; Boswell, Hsieh & Lim.*

TOBACCO IMPORTERS AND MANUFACTURERS SDN. BHD. v. THE REGISTRAR OF TRADE MARKS, SINGAPORE

[O.C.J. (Kulasekaram J.) October 7, 1975]
[Singapore — Originating Motion No. 5 of 1974]

Trade Mark — Application for registration of trade mark on carton cut-out — Registrar rejected application — Mark not distinctive but highly descriptive — Appeal to court dismissed — Grounds of decision — Trade Marks Act (Cap. 206), s. 10(1) and (2).

Trade Marks — "Virginia gold" mark — Tobacco trade — Whether common to trade.

The appellants applied for the registration of a trade mark contained on a carton cut-out from a white and red cigarette packet in Class 34 in respect of cigarettes. The main features on the said mark are as follows:—

(1) The panel is almost half white and half red where the red area divides the panel by a centre red rectangular band;

(2) On the centre red half of the panel appear in bold white letters the words "VIRGINIA GOLD";

(3) A pictorial device of the 2 golden coloured tobacco leaves is embossed with the top half of the leaves falling on the red panel and the bottom half of the leaves falling on the lower white panel.

The Registrar of Trade Marks considered the three aforesaid main features of the mark separately and concluded that none of the said features satisfied any one of the requirements under the five heads (a) to (e) of section 10(1) of the Trade Marks Act. The appellants then appealed against the Registrar's decision refusing their application.

Held: (1) before arriving at a decision whether a mark should be registered or not, one should properly look at the mark as a whole and not merely at its main features;

(2) the words "VIRGINIA GOLD" are so strongly descriptive of the character and quality of the goods that they are ill adapted inherently to distinguish the goods of the appellants from like goods of other traders and manufacturers. The Registrar was right in coming to the conclusion that these words by themselves are not distinct and cannot be the basis for registering the mark;

(3) the mere combination of non-distinctive marks here as it does not incorporate any new idea gives no distinctiveness to the mark but merely serves as embellishments. The addition of the pictorial device of the two gold coloured leaves to the words "VIRGINIA GOLD" merely serves to emphasise the descriptive character of the mark;

(4) the appeal is dismissed with costs.

Cases referred to:-

(1) *"Yorkshire Copper" case* (1954) 71 R.P.C. 150.
(2) *British-American Tobacco Co. Ltd.* v. *Tobacco Importers and Manufacturers Ltd. & Ors.* [1963] M.L.J. 196.
(3) *"Diamond T" Trade Mark case* (1921) 38 R.P.C. 373.
(4) *"Rotolok" Trade Mark case* [1968] R.P.C. 227 at p. 230.
(5) *Frank James Davis (trading as The Ustikon Company) and Anor.* v. *The Sussex Rubber Co. Ltd.* 44 R.P.C. 412.
(6) *"BBI Litetrac" Trade Mark case* [1971] R.P.C. 1.

TRADE MARKS.

T. H. A. Potts and *S. Murugasu (Miss)* for the appellant.

R. Magnus (Registrar of Trade Marks) and *Abdul Rahim Rajudin* (Deputy Registrar) for the respondent.

Kulasekaram J.: This is an appeal from the decision of the Registrar of Trade Marks refusing an application made by the appellants, Tobacco Importers and Manufacturers Sendirian Berhad for the registration of a

trade mark contained on a carton cut-out from a white and red cigarette packet in Class 34 in respect of cigarettes.

A representation of the mark applied for is exhibited at page 1 of the grounds of decision of Mr. Lee Ah Wong, the officer who dealt with this application on behalf of the Registrar of Trade Marks.

During the course of the hearing of this appeal the Registrar of Trade Marks and the appellants agreed for purposes of this appeal that the only mark to be considered for registration is what appeared in the central panel of the carton cut-out and not the mark on the whole of the carton cut-out as originally represented.

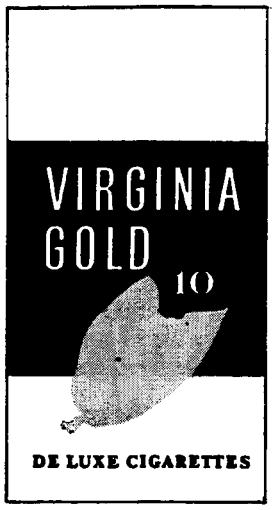
The main features on this mark in the central rectangular panel are: —

(1) The panel itself is almost half white and half red where the red area divides the panel by a centre red rectangular band.

(2) On the centre red half of the panel appear in bold white letters the words "VIRGINIA GOLD".

(3) A pictorial device of the 2 golden coloured tobacco leaves is embossed with the top half of the leaves falling on the red panel and the bottom half of the leaves falling on the lower white panel.

These are the main 3 features of this mark as could be seen from the representation of that central panel as appended below.



Now section 10 of our Trade Marks Act which refers to the registrability of a trade mark is in the following terms:

"10.—(1) A trade mark (other than a certification of trade mark) registrable in Part A of the register must contain or consist of at least one of the following essential particulars: —

(a) the name of a company, individual or firm represented in a special or particular manner;

(b) the signature of the applicant for the registration or some predecessor in his business;

(c) an invented word or invented words;

(d) a word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or surname;

(e) any other distinctive mark; provided that a name, signature, or word or words, other than such as fall within the descriptions in the above paragraphs (a), (b), (c) and (d), shall not be registrable under the provisions of this paragraph except upon evidence of its distinctiveness.

(2) For the purposes of this section 'distinctive' means adapted, in relation to the goods in respect of which a trade mark is registered or proposed to be registered, to distinguish goods with which the proprietor of the trade mark is or may be connected in the course of trade from goods in the case of which no such connection subsists, either generally or, where the trade mark is registered or proposed to be registered subject to limitations in relation to use within the extent of the registration.

(3) In determining whether a trade mark is adapted to distinguish as aforesaid the Registrar or the court may have regard to the extent to which —

(a) the trade mark is inherently adapted to distinguish as aforesaid; and

(b) by reason of the use of the trade mark or of any other circumstances, the trade mark is in fact adapted to distinguish as aforesaid:

Provided always that any mark which has been registered as a distinctive mark in Part A of the register kept in the United Kingdom under the Trade Marks Act, 1938, shall be deemed to be a distinctive mark for the purpose of this Act."

It will be observed that for a trade mark to be registrable in Part A of the register it must contain or consist of at least one of the essential particulars as set out in section 10(1)(a) to (e).

The Registrar in considering this application considered the 3 main features of the mark in question separately and came to the conclusion that none of these 3 main features satisfied any one of the requirements under the five heads (a) to (e) of section 10(1) of the Act. He also took the view that the mark when considered as a whole also did not satisfy the requirements of section 10(1). In these circumstances the application for registration in Part A of the register was refused by the Registrar.

The appellants' main contention before me was that the Registrar had come to a wrong decision here because he had paid too much attention to the separate features of the mark and had not sufficiently directed his mind to a proper consideration of the mark as a whole. It is their contention that the mark if so considered would come under head (e) of section 10(1) in that it is a distinctive mark.

I agree that before arriving at a decision whether a mark should be registered or not, one should properly look at the mark as a whole and not merely at its main features. However where a mark consists of a combination of a number of features I see nothing objectionable in ascertaining and examining the main features of the mark first and then finally looking at the whole mark as a whole with all the features present in it and deciding whether the mark should be registered or not. This preliminary investigation of examining the main features of the mark is often of great assistance when it comes to the final consideration of the mark as a whole. The decision itself must of course be based on the consideration of the mark as a whole.

I propose first to deal with the words "Virginia Gold" which is one of the 3 main features and perhaps the most predominant feature of the work. The word "Virginia" or "Virginian" when used in relation to tobacco and cigarettes means in this class of trade and

to the public generally a particular type of tobacco and cigarettes made from that particular type of tobacco and not that the tobacco comes from the state of Virginia in the United States of America. The word "Virginia" is now generally used as applying to flue-cured tobacco leaf wherever grown and to cigarettes made from that particular type of tobacco. In this class of trade it is not in serious dispute here that the word "Virginia" is common to the trade in the senses that (1) it is in common use in the trade and (2) it is open to the trade to use it.

Similarly the word "gold" too in this class of goods appears to be common to the trade. Here again there is no serious dispute on this point.

During the course of the hearing of this appeal a number of registered marks in Class 34 relating to tobacco and cigarettes and other goods of that manufacture were referred to and exhibited to support the arguments put forward by counsel on both sides. Besides marks registered in Singapore, I was also referred to marks registered in the United Kingdom because our Trade Marks Registry follows closely the United Kingdom practice as regards registration of marks and marks which are accepted as distinctive and registered in the United Kingdom are accepted as such for registration in Singapore. Besides our Trade Marks Act is similar in many respects to the U.K. Trade Marks Acts of 1938.

These marks that were referred to more than amply supported the proposition that the words "Virginia" and its derivatives and "gold" and its derivatives were each common to the trade. What the appellants' counsel, Mr. Potts, contends here is that though the words "Virginia" and "Gold" and their derivatives are common to the trade the combination or juxtaposition of these 2 words as "Virginia Gold", "Gold Virginia" or "Golden Virginia" are not common to the trade. He submits that the combination "Virginia Gold" as used in respect of the appellants' goods is distinctive of their goods. The words "Virginia Gold" as a mark is inherently adapted to distinguish their goods. He further asserted that as user of the mark for 7 years they have shown by affidavit evidence that the mark "Virginia Gold" is in fact adapted to distinguish their goods.

Mr. Potts also referred to the U.K. Registered Trade Mark No. 844386 in Class 34 in respect of tobacco whether manufactured or unmanufactured. The main distinctive feature of this mark is the combination of the words "Golden Virginia". This mark is exhibited at page 9 of Mrs. Zaida Short's affidavit sworn on the 15th of July, 1974. Mr. Potts contends that if the "Golden Virginia" mark could be accepted as distinctive and registered in the United Kingdom he cannot see any reason why the mark "Virginia Gold" of the appellants here could not be accepted as distinctive for purposes of registration.

Mr. Magnus, the present Registrar of Trade Marks, submits that the mere combination of 2 words where each of them is common to the trade and therefore non-distinctive does not by itself make the combination distinctive. For the combination to be distinctive there must be some new idea in the combination. He submits there is nothing new or distinctive about the combination "Virginia Gold".

First he say that in this class of trade the word "Virginia" combined with the word signifying a colour as for example "Blue" or "Red" does not make the combination "Virginia Blue" or "Virginia Red" a distinctive feature of a mark. So where such a combination is incorporated in a Trade Mark it has been the practice both in the United Kingdom and here to ask the applicant to disclaim any rights to such a combination as "Virginia Blue" in the mark, which is propounded for registration before the mark is accepted for registration.

This can be seen from the Singapore Registered Marks No. 49949, 44950, 50002, 50003 where in the marks "Tim Virginia Red", "Tim Virginia Blue", "Tim Virginia Green" and "Tim Virginia White" respectively the right to the exclusive use of the words "Virginia Red", "Virginia Blue", "Virginia Green", respectively have been disclaimed. Similarly from the U.K. Registered Trade Marks No. 959524 and No. 959525 in the Marks "Benson and Hedges Virginia Blue" and "Benson and Hedges Virginia Red" respectively the right to the exclusive use of the words "Virginia Blue" and "Virginia Red" respectively has been disclaimed.

The word "Gold" can also signify the colour gold. So in accordance with the Trade Mark practice both here and in the United Kingdom, the Registrar here would require any right to the exclusive use of the words "Virginia Gold" to be disclaimed in respect of the mark of the appellants here under consideration before he accepts it for registration.

Secondly Mr. Magnus submits the word "Virginia" with reference to tobacco speaks of the type of tobacco that goes into its manufacture. The word "Gold" too has a special significance when referred to tobacco, especially Virginia tobacco. Good Virginia tobacco is generally referred to as golden in colour. So the addition of the word "Gold" to "Virginia" makes the combination even less distinctive and therefore more objectionable as a mark. The words "Virginia Gold" have a greater and more direct reference to the character and quality of the goods here than even "Virginia".

I agree with the submission of Mr. Magnus and I find that the words "Virginia Gold" are so strongly descriptive of the character and quality of the goods here that they are ill adapted inherently to distinguish the goods of the appellants from like goods of other traders and manufacturers. As was said by Lord Simonds in the *"Yorkshire Copper" case*[1] "the more apt a word is to describe the goods of a manufacturer, the less apt it is to distinguish them from the goods of others; for a word that is apt to describe the goods of A is likely to be apt to describe the similar goods of B."

There is some evidence of user over a period of 7 years adduced here to show that the mark and indeed the words "Virginia Gold" are adapted in fact to distinguish the goods of the appellants and the words "Virginia Gold" had to some extent become distinctive of the goods of the appellants. I take the

view even with stronger evidence of user than has been adduced here to show that the words "Virginia Gold" are in fact adapted to distinguish the goods of the appellants yet the words "Virginia Gold" by themselves as a mark will not satisfy the requirements under section 10(1)(e) that it is a distinctive mark because the words themselves are not adapted inherently to distinguish the goods as they are so very strongly descriptive of the goods. In my view the Registrar was right in coming to the conclusion that these words by themselves are not distinctive and cannot be the basis for registering the mark under review here. It would be wrong under the circumstances to give any one trader the exclusive right to the use of these words in respect of this class of goods.

Let me next consider the second main feature of this mark. This consists of the pictorial device of 2 golden tobacco leaves. Mr. Magnus's submission here is that whenever a pictorial device of tobacco leaves forms part of a registered mark in this class of goods the practice of the Trade Mark Registry here as well as in the United Kingdom is to treat the pictorial leaves device as of a non-distinctive character and common to the trade and require the owner of the mark to disclaim any exclusive right to the pictorial device as a condition for registering the mark. That this is so is amply supported by the many registered marks with leaf devices to which I have been referred to during the course of the hearing before me. I agree that there is nothing distinctive about this feature of the mark and if the mark is to be accepted for registration then like in all other cases the device of the 2 leaves will have to be disclaimed.

Then there is the third main feature of this mark for consideration. This third feature concerns the division of the central panel into red and white panels as I have already described earlier. This division of the panel into red and white panels forms a mark. The question is whether there is anything distinctive about this mark. The same question was considered by Ambrose J. in *British-American Tobacco Co. Ltd.* v. *Tobacco Importers and Manufacturers Ltd. and others*,[2] and he there took the view that this red and white panel mark was not a distinctive mark. I have myself considered this feature of the division of the central panel into red and white panels with other registered marks in this class having their central panel in red and white. I was referred to many such registered marks. I find there is nothing inherently distinctive about this feature of the mark. It would appear that the appellants themselves did not attach much importance to any particular pattern for the division of the panel into red and white panels. In their earlier marks the red panel was on top and the white panel was below but in the mark presented with the application they seemed to have changed this pattern as the red panel now appears in the centre of the central panel with white panels above and below the red panel.

Finally we come to the main contention of the appellants here. Mr. Potts submits that the appellants have applied for registration of the mark that appears on the central panel. This mark includes the three main features which we have just considered. Even if there is nothing distinctive in any of these 3 main features he contends that this mark which includes these 3 non-distinctive features when looked at as a whole becomes a distinctive mark and that mark satisfies the requirements of section 10(1)(e) in that it is distinctive. The mark can be visually seen to be a distinctive mark and is therefore inherently adapted to distinguish the goods of the appellants. He further urges that by the evidence of user of this mark for over 7 years the appellants have shown that the mark in fact is adapted to distinguish the goods of the appellants.

Mr. Potts relies heavily on the decision in the *"Diamond T" Trade Mark case*.[3] In that case the mark applied for was to be used in Class 22 in respect of Motor Cars and Motor Trucks. The mark was a combination composed of 3 elements, namely, (1) a double diamond-shaped border, (2) the word "Diamond" in block type placed horizontally within the border, and (3) the letter 'T' in large block type also placed within the border in such a position that the downstroke of the 'T' intersects the letter 'M' in the word "Diamond". There it was held that though the 3 elements composing the mark were common to the trade the mark itself which is a combination of these 3 elements was so being used for the first time in that manner and was distinctive and adapted to distinguish the goods of the applicant.

Mr. Magnus however contends that the combination of the 3 common features in the mark here does not make the combination mark in any way distinctive. There is no new idea at all represented by the combination. The words "Virginia Gold" are highly descriptive of the goods and the addition of the pictorial device of the 2 gold coloured tobacco leaves merely serves to further emphasise the character and quality of the goods. The further incorporation of the red and white panels does not in any way make the mark distinctive.

I have considered the *"Diamond T"* case and I find it can be distinguished from the circumstances of the present case. In that case Lawrence J. at page 381 had this to say about that mark. "It is in no sense a mark which would convey to the eye or ear of a purchaser that it is being used in a descriptive or laudatory sense nor is it one which might reasonably be supposed to apply to motor vehicles generally."

In the instant case the descriptive feature of the mark is too prominent even when the mark is looked at as a whole and to my mind it is therefore not distinctive. This mark will very probably be referred to as the "Virginia Gold" mark and to a lesser extent perhaps as the "Gold Leaves" mark. To the ear the descriptive character of the mark will be predominant. In my view to allow the registration of this mark even with the disclaimer of the words "Virginia Gold" and the pictorial device of the 2 gold coloured tobacco leaves would be quite unsatisfactory in principle. I say this because though the words "Virginia Gold" would be disclaimed, as this is the predominant feature of this mark the goods of the appellants would still tend to be known by these disclaimed words as if they were not disclaimed. The appellants would thus acquire an unfair right to the use of these words over other traders.

The mere combination of 2 non-distinctive marks does not make the combination a distinctive mark. If the combination of the words "Virginia Gold" with the addition of the pictorial device of the 2 gold coloured leaves here were to give a distinctive mark then another trader can combine the words "Virginia Gold" with a different and more elaborate pictorial device of tobacco leaves and claim that the combination mark of his is different from the appellants' mark and is distinctive. This in my view cannot be so. The mere combination of non-distinctive marks here as it does not incorporate any new idea gives no distinctiveness to the mark but merely serves as embellishments. As I had said earlier the addition of the pictorial device of the 2 gold coloured leaves to the words "Virginia Gold" merely serves to emphasise the descriptive character of the mark.

I next refer to the submission made by Mr. Potts in connection with the United Kingdom Registered Mark No. 844386 in the same class in respect of "Golden Virginia" mark which was exhibited at the hearing before me. It is his submission that all the objections here to the "Virginia Gold" mark should equally apply to the "Golden Virginia" mark in the United Kingdom but still that mark has been registered there. I believe this "Golden Virginia" mark was originally registered in the 1880's and the present registration is dependent on this old registration.

In this connection I would like to refer to a foot note at page 394 of *Kerly's* Law of Trade Marks, 10th Edition, where the learned editors with reference to descriptive marks say "Although such marks are unregistrable, a registration already in existence may well be valid." I venture to suggest that this may be the basis of the registration of the "Golden Virginia" mark.

This may also explain why the 8 cornered star which appears in this mark is not disclaimed while the ordinary star device in other registered trade marks in this class have been disclaimed. This also explains the United Kingdom Registration Trade Mark No. 905684 of the "Gold Star" mark which has also been exhibited before me. The star in this mark is again the 8 cornered star which is a very old mark.

In this connection I would also like to refer to a passage in Buckley J.'s judgment in the *"Rotolok" Trade Mark case.*[4] "As regards the existing registrations, I do not think that they can really be of assistance, because I cannot tell what special circumstances there may have been to justify registration of those marks, and I do not for myself think that the fact that these other registrations already exist affords a special circumstance which makes it easier to say that the mark now sought to be registered is capable of distinguishing the applicant's goods." These remarks of Buckley J. apply equally to the present matter under consideration here provided it is borne in mind that the application there was only for registration in Part B of the register.

I find that the mark here when looked at as a whole is not a distinctive mark as it is highly descriptive of the character and quality of the goods and is therefore not inherently adapted to distinguish the goods of the appellants. Therefore this application for registration of the mark in Part A of the register was correctly refused by the Registrar.

Lastly it is Mr. Potts' submission that even if the mark was not accepted for registration in Part A of the register, in any event the Registrar should have allowed the registration of the mark in Part B of the register.

Section 12 of the Trade Marks Act relates to registration in Part B of the Register and is different from the corresponding section 10 of the U.K. Trade Marks Act, 1938 but is in *pari materia* with section 2 of the U.K. Trade Marks Act of 1919.

He submits that this is a second avenue of getting a mark on the Register. The requirements for such registration are less onerous than in the case of an application for the mark to be registered in Part A of the register. Once there is proof of user of the mark for at least 2 years and the Registrar is satisfied that the mark is capable of distinguishing the goods of the applicants and the other requirements of the section are also satisfied then the Registrar has no discretion but is obliged to accept the mark for registration in Part B of the Register.

He says here there is over 7 years user of the mark and he has also shown by such user that the mark is in fact capable of distinguishing the goods of the applicant. Besides the mark is also inherently capable of distinguishing the goods of the applicant, though the extent of this inherent capability to distinguish need not be in any way substantial. In the circumstances the Registrar was clearly wrong in refusing to allow registration of the mark at least in Part B of the Register.

The evidence here of user of the mark for a period of over 7 years from a director of the appellants and from two tobacco and cigarettes distributors on affidavits went to show that the mark in fact is capable of distinguishing the appellants' goods and in fact distinguishes the goods to a substantial extent. I do not consider the evidence adduced is by any means so strong as to find that the mark by 7 years user has in fact become 100% distinctive of the appellants' goods.

I find that earlier objection that the mark is highly descriptive of the goods applies here too and the mark is therefore inherently incapable of distinguishing the appellants' goods.

In *Frank James Davis (trading as The Ustikon Company) and another* v. *The Sussex Rubber Co. Ltd.*,[5] an application was made to have the mark "Ustikon" removed from Part B of the Register, the mark "Ustikon" which was a mis-spelling of the words "You stick on", was used for rubber soles which could be stuck on and required no nailing on to the shoes. It was held in that case that though the words "you stick on" were descriptive of the character of the goods yet the mark "Ustikon" in spite of it being a mis-spelling of these words "you stick on" was not at first sight a phonetic equivalent for these words. Sargant L.J. in that case said:

"On the whole, therefore, though with some doubt, I cannot say that the Registrar was bound to decide on *a priori* grounds

that the mark 'Ustikon' was incapable of distinguishing Mr. Davis' soles. And this being so, and the other conditions of registration in Part B. having been satisfied, the registration was in order and the mark cannot now be taken off. But the case seems to me very near the line. And I hope — perhaps against hope — that the result of this decision will not be to choke the B. Register with horribly misspelt words, which were originally intended to bear and still to some extent suggest a more or less obvious reference to the ordinary characteristics of the goods they denote."

In the mark under consideration here there is no circumstance present to detract from the descriptive character of the mark.

I would also like to refer to the *"BBI Litetrac" Trade Mark case.*(6) An application was made to register the trade mark "BBI Litetrac" in respect of installations for lighting, lighting fittings and lamps all included in Class II. The letters "BBI" were non-distinctive and the word "Litetrac" is a mis-spelling of, and the phonetic equivalent of the words "light track". In dismissing the appeal against the refusal to register the mark it was held the presence of the non-distinctive letters "BBI" did not lessen the aptness for normal description of the word "Litetrac" as to render the mark applied for capable of registration.

For these reasons I find that the Registrar correctly refused this application for registration in Part B of the Register too.

In the circumstances this appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Rodyk & Davidson.*

MALAYSIAN REPORTS

HARLEY v. ONONG BINTI AH HING

[A.C.J. (Seah J. (President), Datuk Haji Abdul Wahid Wee, Resident and Matimbon bin Majangkin, District Chief) September 26, 1974]

[Kota Kinabalu — Native Court of Appeal No. 1 of 1973]

Native Customary Law — Appellant not a native — Case brought in Native Court against the appellant — No sanction of District Officer — Native Courts Ordinance (Sabah Cap. 86), s. 5(1)(b).

Practice and Procedure — Sanction to institute legal proceedings — Native Courts Ordinance (Sabah Cap. 86), s. 5(1)(b).

In this case the Native Court at Papar had purported to make an order on an application by the respondent against the appellant, her husband, for the division of pencarian property. The order was affirmed by the District Officer. The appellant appealed against the order on the ground that he was not a native and the sanction of the District Officer was not obtained as required under section 5(1)(b) of the Native Courts Ordinance (Cap. 86).

Held: when legal proceedings were instituted against the appellant in this case, no sanction had been obtained from the District Officer, Papar, and therefore the proceedings in the Native Court were null and void and its decision must be set aside.

Cases referred to:-

(1) *Gokulchand Dwarkadas Morarka* v. *The King* A.I.R. 1948 P.C. 82.

(2) *Public Prosecutor* v. *Oie Hee Koi & Associated Appeals* [1968] 1 M.L.J. 148 at p. 154.

(3) *Yek Tieng Sing & Ors.* v. *Public Prosecutor* [1971] 2 M.L.J. 94.

(4) *Thorpe* v. *Priestnall* [1897] 1 Q.B. 159.

NATIVE COURT OF APPEAL.

Seah J., President (delivering the judgment of the Court): This is an appeal by the appellant from a decision of the Papar Native Court given on January 30, 1973 whereby the Native Court purported to make an order that the "pencharian", namely the money in the bank, the house at Kimanis and the land at Mile 8 (presumably at Papar) be divided into two shares to be shared between the appellant (husband) and the respondent (wife) and that in the future, both the appellant and the respondent may be at liberty to arrange the distribution of the "pencharian" among their children. An appeal against the decision of the Papar Native Court was brought before the District Officer at Papar and the District Officer having been satisfied with the said judgment dismissed the appeal on May 5, 1973. The appellant is dissatisfied with both decisions and has lodged an appeal to the Native Court of Appeal on the following grounds, namely:

(1) since only one party is a native (that is my wife) the sanction of the District Officer is required under section 5(1)(b) of the Native Courts Ordinance (Cap. 86) and such sanction does not appear to have been obtained to enable the Native Court to have jurisdiction in this case.

(2) there was no breach on my part of native law or native custom, religious, matrimonial or sexual for the case to go before the Native Court. There was no evidence that I was deserting my wife. On the contrary, my wife had agreed to migrate and settle in Australia together with our children